IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 208, A. F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,
Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS

DONALD J. HOWE
61 N. Second Avenue
Sturgeon Bay, Wisconsin

Of Counsel:

GEORGE E. FREDERICK and
WILLIAM J. MANTYH
622 N. Water Street
Milwaukee 2, Wis.

JOHN H. WESSEL
2040 W. Wisconsin Ave.
Milwaukee 3, Wis.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A.F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,

Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The memorandum opinion of the Circuit Court for Door County (R. 1) is unreported. The opinion of the Wisconsin Supreme Court (R. 24) is reported in 4 Wis. 2d 142, 89 N. W. 2d 920.

STATUTES CITED

The federal statutory provisions are primarily sections 2 (1) (2), 8 (b) (4) (A) and (b) of the National Labor Relations Act.

The Wisconsin statutes involved are sections 59.01, 59.08 (1), 66.29 (6) and 134.01. These statutes are printed in Appendix A of this brief.

STATEMENT

Respondent agrees with the statement of the petitioners and amicus curiae, but presents the following additional facts:

Door County, through the Property and Building Committee of the Door County Board, let the contracts for the construction of the courthouse addition to the low bidders (R. 11). The Property and Building Committee was authorized to take charge of construction by the County Board (R. 14).

The business agent of Plumbers' Local 298 was given authority, by action on a motion at a regular union meeting, to place a picket on any job where there is a non-union plumber working on the job (R. 19). It was known to the union agent that when a picket was put on a job, the job stops. (R. 19).

The trial court found that the picketing was coercive and amounted to economic pressure, and was designated to cause a work stoppage (R. 12).

There was no controversy between the general contractor and his employees (R. 16) and no controversy between Zahn, the plumbing contractor, and his employees (R. 18), and the court so found (R. 1).

QUESTIONS PRESENTED

In addition to the question presented in the brief of the petitioners and the question presented in the brief of the National Labor Relations Board, Amicus Curiae, the following questions are raised by this appeal:

1. Does our federal scheme authorize Congress to pre-empt the field of law designed by a State to protect the essential functions of government of the State or an agency thereof?

2. Has Congress attempted to pre-empt labor disputes which interfere with the execution of essential governmental functions of a State or an agency thereof?

3. Is the area of essential governmental functions of a State, or Agencies thereof, at most, subject to concurrent jurisdiction of the Board and State agencies and courts?

SUMMARY OF ARGUMENT

The statutes of the State of Wisconsin regulate the procedure for letting contracts for municipal construction and apply to the courthouse construction which was picketed. The courthouse was essential to the governmental functions of the State of Wisconsin, and therefore regulation of picketing of such courthouse construction cannot be controlled by the jurisdictional standards set up by the National Labor Relations Board.

The NLRB vs. Local 313 Electrical Workers case, 254 F. 2d 221, should not control this case, because it was the intention of Congress to leave under the National Act the area of employer-employe relationships subject to state control, and, as evidenced by the instant case, there is even greater need for the states to control areas beyond employer-employe relationship.

The Federal Act is not in all instances exclusive, and does leave areas wherein the state has, in addition to the federal remedy, additional remedies in its courts.

ARGUMENT

I

UNDER OUR FEDERAL SYSTEM, CONGRESS IS NOT EMPOWERED TO PRE-EMPT THE ADMINISTRATIVE AND JUDICIAL SYSTEM DESIGNED BY STATES TO PROTECT THE ESSENTIAL FUNCTIONS OF THE GOVERNMENT OF THE STATE OR AN AGENCY THEREOF.

The concurring opinion in Supreme Court of the State of Wisconsin below was based upon this principle:

> "State of South Carolina v. United States, 1905, 199 U.S. 437, 451-452, 26 S. Ct. 110, 112, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:
>
> 'Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it follows from the 2d clause of article 6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the national government of all the powers conferred upon it.'
>
> "The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress

may preempt the field of labor relations as they may affect interstate commerce, the courts of the state under the principle of State of South Carolina v. United States, supra, can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith."

The Statutes of the State of Wisconsin have set up definite rules, which must be followed in letting contracts for municipal construction in excess of $1,000. Sec. 59.01 gives to a municipal corporation the power to enter into contracts for necessary and proper work. Sec. 59.08 provides that all work done in the construction of a building which shall exceed $1,000 by a municipality shall be let by contract to the lowest responsible bidder. Sec. 66.29 (6) provides that a municipality must separately let (a) Plumbing; (b) Ventilating; and (c) Electrical Contracts.

Since the building was in the process of construction and the bids had been let, Door County was placed in a completely untenable position at the time the picket was placed on the job. The plumbing contract could not be consolidated with the general contract, because of the provisions of Sec. 66.29 (6) of the Statutes, which provide that the municipality must let them separately. The bids had been accepted, and Door County had a contract obligation with the bidders. Door County could not buy off the plumbing contract, because that would be an illegal expenditure of public funds. Menasha Wooden Ware Co. and others, v. Town of Winter and others, 159 Wis. 437.

The conduct engaged in by the Union in this case is also criminal under the state law. Wisconsin Statutes, Sec. 134.01.

The significance of the application of the principles of our federal system to this question is best emphasized by the argument in petitioner's brief at pp. 21-22. Petitioner contends that under the Garner v. Teamsters decision, 346 U.S. 485, as well as the other "pre-emption" decisions, the Congressional enactment is exclusive even though the federal act might be construed to exclude States from the term "person" and which would leave a State or an agency thereof with no remedy whatever to protect its essential governmental functions.

While this argument bears little investigation it does suggest another potential, and even probable, consequence flowing from the "pre-emption" decisions if applied to State governments, to-wit: The effective carrying on of essential functions of government would rest with the jurisdictional standards adopted by the National Labor Relations Board. In other words, if the jurisdictional standards of the Board were not met, the essential functions of State government, since its relation to interstate commerce is primarily in its construction of buildings, would find itself in the "no man's land" of federal-state labor regulations.

Certainly our federal systems did not intend that Congress frustrate the essential administration of local government (i. e.

construction of jails, police stations, schools and courthouses) by indirect action when it could not do so.

II

THE TAFT-HARTLEY ACT DID NOT ATTEMPT TO REGULATE THE ESSENTIAL FUNCTIONS OF STATE GOVERNMENTS, OR AGENCIES THEREOF, THROUGH ITS PRE-EMPTIVE POLICIES.

In Local No. 25, Teamsters etc. v. N.Y., N.H. & H.R. Co., 350 U.S. 155, this court held that while railroads were excluded from the definition of "employer" in section 2 (2) of the Taft-Hartley Act, the statute did not expressly exclude railroads from the definition of the term "person" and that therefore they are entitled to Board protection from the kind of unfair labor practice prescribed by section 8 (b) (4) (A). (Incidentally, we fail to see what labor "organizing" or "collective bargaining" purpose was being espoused by the picketing in that case. The mere fact that a union was protesting "piggy-back" competition to truckers did not warrant invoking that Taft-Hartley Act and the chain reaction which that decision developed into, as hereafter explained.) Following this ruling, the board reversed its prior "correlative right-duty" approach and held that it had jurisdiction upon a charge brought under section 8 (b) (4) (A) by a county government. This was affirmed in N.L.R.B. v. Local 313, Electrical Workers, 254 F. 2d 221 (C.C.A.

3rd, 1958) in which the court held:

> "This point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.
>
> The order of the Board will be enforced."

The Supreme Court of the State of Wisconsin, in the instant case, disagreed with the Local 313 decision upon the grounds that the rules of statutory construction used in the Local 25 case, involving railroads is not the statutory construction rule used when a statute of general application is sought to be applied to a government, federal or state, or agencies thereof, citing among other authorities the following:

Palmer v. Commonwealth of Mass.,
308 U.S. 79
Federal Trade Commission v. Bunte,
312 U.S. 349
82 C.J.S. Statutes § 317, p. 554
50 Am.Jur., Statutes § 222, p. 199

Presumably it was congressional intention, in excluding political subdivisions of the state from the definition of "employer" and in refusing to mend the Wagner Act in 1938, to exclude political subdivisions from the definition of "person" (S. 3390, 82 Cong. Rec. 1488-1489). This effectuates the principle of

Constitutional Law that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the essential governmental powers of the other. Educational Films vs. Ward et. al., 282 U.S. 379; Metcalf vs. Mitchell, 269 U.S. 514; South Carolina v. United States, 199 U.S. 437.

The definition of "employer" in section 2 (2) of the Act unmistakably gives rise to Congressional intention to permit the states to deal freely with their own employes and thus be enabled to discharge their functions of government without being fettered and restricted by the exercise of federal power, and this reasoning applies equally to areas of primary employer-employe relationship with the state or its subdivisions and employes and in other areas of labor dispute which directly affect the essential governmental function of the subdivision of the state. Indeed there is greater need for the state, if it is to effectuate its government, to control areas of labor dispute beyond the primary employer-employe relationship.

The courts, in preserving the balance between national and state power, should accord to the various provisions of fundamental law their natural effect in the circumstances disclosed. So to do is not to make subtle or technical distinction or deal in legal refinements, even though as a result seemingly inconsequential differences may require diverse results. Pacific Coast Dairy v. Dept. of Agriculture, 318 U.S. 285; Rehearing denied, 318 U.S. 801.

This court has in cases involving conflicts between the states' rights and the Federal Act consistently held that an area of Federal preemption was not completely defined.

> "As Garner v. Teamsters Union, 346 U.S. 485, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the states much that had theretofore vested with them. But the other half of what was pronounced in Garner v. Teamsters--that the Act 'leaves much to the states' is no less important. 346 U.S. 485, at 488. The statutory implications concerning what has been taken from the states and what has been left to them are of a Delphic nature to be translated into concreteness by the process of litigating elucidation. See Weber v. Anheuser-Busch, Inc., 348 U.S. 468"
>
> Association of Machinists v. Gonzales, 356 U.S. 617 reh. den. 357 U.S. 944

Congress should never be held to intend to supersede or by its legislation suspend the exercise of police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. Schwartz v. Texas, 344 U.S. 199. See also California v. Zook, 336 U.S. 725.

As recently stated in Association of Machinists v. Gonzales, 356 U.S. 617:

> "*** Such a drastic result, on the remote possibility of some entanglement

with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 34 LRRM 2229."

III

THE AREA OF ESSENTIAL GOVERNMENTAL FUNCTIONS OF A STATE, OR AGENCIES THEREOF, AT MOST, IS SUBJECT TO THE CONCURRENT JURISDICTION OF THE BOARD AND STATE AGENCIES AND COURTS.

In reviewing the legislative history of the National Act, the dissent in UAW v. Russell stated:

"It is clear from the legislative history of the Taft-Hartley Act that in subjecting certain conduct to regulation as an unfair labor practice Congress had no intention of impairing a State's traditional powers to punish or in some instances prevent that same conduct when it was offensive to what a leading case termed ' such traditionally local matters as public safety and order and the use of streets and highways.' Allen-Bradley Local v. Wisconsin Board, 315 U.S. 740, 749, 10 LRRM 520. Both proponents and critics of the measure conceded that certain unfair labor practices would include acts 'constituting violation of the

law of the State,' 'illegal under State Law,' punishable under State and local police law', or acts of such nature that ' the main remedy for such conditions is prosecution under State law and better local law enforcement.' It was this role of state law that the lawmakers referred to when they conceded that there would be 'two remedies' for a violent unfair labor practice. For example, when Senator Taft was explaining to the Senate the import of the Sec. 8 (b) (1) (A) unfair labor practice, he responded in this manner to a suggestion that it would 'result in a duplication of some of the State laws':

> 'I may say further that one of the arguments has suggested that in case this provision covered violence it duplicated State law. I wish to point out that the provisions agreed to by the committee covering unfair labor practices on the part of labor unions also might duplicate to some extent that State law. Secondary boycotts, jurisdictional strikes, and so forth, may involve some violation of State law respecting violence which may be criminal, and so to some extent the measure may be duplicating the remedy existing under State law. But that in my opinion is no valid argument.'

"This frequent reference to a State's continuing power to prescribe criminal punishments for conduct defined as an unfair labor practice by the Federal Act is in sharp contrast to the absence of any

reference to a State's power to award damages for that conduct." UAW v. Russell, 356 U.S. 634 reh. den. 357 U.S. 944

The fact that the Federal Act is not completely exclusive means that the state has, in addition to the federal remedy, a supplementary remedy which is local speedy, and effective.

Concurrent jurisdiction has in fact been exercised by many states under various pseudonyms and equivocations. The following cases apply, without stating the principle of concurring jurisdiction:

Waterfront Com. v. International Longshoremens Asso. (Sup.) 130 NYS 2d, 862;

Port of Seattle v. Longshoremens Union (Wash. Sup. Ct.) 42 LRRM 2462 (1958);

School Board v. IBEW (Penn. Sup. Ct.) 43 LRRM 2042

State courts have enjoined picketing prescribed by the National Act to compel employe to breach a contract. Planert Wood Products v. Doe, 175 NY 2d, 407, to compel recognition even though another union had been certified by the NLRB, where no strike was involved. Pleasant Valley Packing Co. v. Taloriev, 177 NY 2d, 473, when the picketing constituted a trespass on the employer's premises. Your Food Stores v. Retail Clerks Local, 124 F. Supp. 697 (C.C. N. M.); picketing to compel employer to hire local union members, Hanson v. Int. Union of Operating Engineers (LA.App.) 79 So. 2d 199.

Picketing of distributors for bakery enjoined because they were independent contractors. 157 NYS 2d, 355; 138 NE 2d, 723.

Picketing to obtain union shop. Minor v. Building & Constr. Trades Council, ND 75 NW 2d, 139;

Picketing to induce breach of contract by employes of plant picketed. Standard Oil Co. v. Oil Chemical & Atomic W.I.V. (Ohio) 144 NE 2d 517;

Picketing where subcontractor employed non-union labor and NLRB refused jurisdiction. Texas 285 SW 2d 942; and have issued injunction to prevent union distributing circulars urging boycott of company's products. Adams Dairy, Inc. v. Burke, 293 SW 2d 281; Cert. den. 352 U.S. 969.

We offer the following brief comments upon petitioner's attempt to take issue with the reasoning used in the concurring opinion below (Petitioner's Brief pp. 18-20):

A State, according to petitioner's brief, p. 18, has the alternative of (1) having no contracts with private persons to assist in carrying out its functions; or (2) conducting its essential governmental functions subject to the same rules and procedures (and limitations) as a private person. Where essential governmental functions are involved, as in public safety, these are empty words.

Next, petitioner argues that the concurring opinion below assumes that right, and not remedies, determine pre-emption. Where essential government functions are involved there is no pre-emption and no conflict between rights or remedies. See U.A.W. vs. Russell, cited above.

Petitioner argues that this case is governed by N.E.R.B. v. Milwaukee G & L. Co., 258 Wis. 1, reversed sub. nom. 340 U.S. 383. That was a public utility case and did not involve a governmental function.

Finally, petitioner argues that the concurring opinion below fails to consider the fact that the same interference with an essential governmental function could be caused by a primary strike or a similar strike by employes of an essential supplier and that these activities could be lawful under both the state and Federal Act and that the State would be without a remedy. In either of the latter two cases the contract would be breached by the primary employer or supplier and the State could use alternative employers or suppliers. In the instant case "unlawful picketing" was involved and the State could not avoid its contract obligations. It itself would have violated the law in changing plumbing contractors.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

DONALD J. HOWE
61 N. Second Avenue
Sturgeon Bay, Wis.

Of Counsel:

GEORGE E. FREDERICK
and
WILLIAM J. MANTYH
622 N. Water Street
Milwaukee, Wis.

JOHN H. WESSEL
2040 W. Wisconsin Avenue
Milwaukee 3, Wis.

RESPONDENT'S APPENDIX

APPENDIX A

Wisconsin Statutes provide as follows:

"59.01 Municipal corporation. (1) STATUS. Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands sold for taxes, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09 (7) (d), to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it."

"59.08 Public work, how done; public emergencies. (1) All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed $1,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section shall not apply to highway contracts which the county highway committee is authorized by law to let or make."

66.29 (6) SEPARATION OF CONTRACTS. On those public contracts calling for the construction, repair, remodeling or improvement of any public building or structure, other than highway structures and facilities, the municipality shall separately let (a) plumbing, (b), heating and ventilating, and (c) electrical contracts where such labor and materials are called for. The municipality shall have the power to set out in any public contract reasonable and lawful conditions as to the hours of labor, wages, residence, character and classification of workmen to be employed by any contractor, and to classify such contractors as to their financial responsibility, competency and ability to perform work and to set up a classified list of contractors pursuant thereto; and such municipality shall further have the power to reject the bid of any person, if such person has not been classified pursuant to the said questionnaire for the kind or amount of work in said bid. Whenever such municipality shall contemplate the letting of any public contract, pursuant to this section, the advertisement for proposals for the doing of the same shall expressly state in effect that the letting is made subject to this section and that such municipality reserves and has the right to reject any and all bids at any time."

"134.01 Injury to business; restraint of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously

compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500."